

## REMARKS/ARGUMENTS

The above-identified patent application has been reviewed in light of the Examiner's Office Action dated December 9, 2008. In view of the amendments presented above and the arguments presented below, Applicant respectfully submits that the claims are in condition for allowance.

The Examiner has objected to the claim of priority. It has also been asserted that the Amendment of August 26, 2005 introduces new matter and thus the amended drawings and disclosure presented therein have been objected to. The disclosure has been objected to as failing to provide sufficient antecedent basis for the term "thin diaphragm" found in Claim 18. Claims 11, 14, 16, 21 and 23 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Claims 11, 12, 14 and 21-23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert (CH 346187) and Fritz. Claims 11, 12, 14 and 21-23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert, Fritz and Oropallo. Claims 13 and 15 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert, Fritz and Ball. Finally, Claims 16-20 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert, Fritz and further in view of Ball '931 and Ball '241.

Claims 11, 18 & 19 have been amended. Claims 1-10 were previously cancelled. Accordingly, Claims 11- 23 are pending.

Applicant addresses each substantive paragraph of the Office Action in turn below.

### **Paragraph 2 - Priority Claim**

The Examiner has objected to Applicant's claim to prior-filed Application No. 09/593,724 ("the '724 application").<sup>1</sup> More specifically, the Examiner contended that copendency is lacking between the instant application and the '724 application.

In response, attention is directed to a Reply Brief filed July 30, 2008 ("Reply Brief") (See pages 6-10 thereof), wherein the Applicant demonstrated that copendency existed between the '724 application and the '533 application, the arguments of that Reply Brief are incorporated by reference herein. The facts show that copendency between the '533 application and the '724 application was

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<sup>1</sup> The Examiner is correct in pointing out that "09/953,724" should be -- 09/593,724 -- and the specification has been amended accordingly.

undeniably desired, and indeed believed to have been achieved. Nevertheless, in order to facilitate prosecution, Applicant filed a Petition to Revive the '724 application, thereby extending the abandonment date of the '724 application from March 28, 2002 to August 28, 2002. On April 22, 2009, the Petition to Revive was granted. In view thereof, Applicant believes the Examiners' objection has been overcome.

#### **Paragraphs 4 and 5 - New Matter associated with the August 26, 2005 Drawings**

The Examiner has objected to a drawing correction filed in an Amendment submitted August 26, 2005. More specifically, the Examiner alleges that the "opening" step associated with the drain port 28 illustrated in Fig. 8 was not found in the originally-filed disclosure. The Examiner has also objected to a portion of the specification added in that amendment describing Fig. 8 as containing new matter under 35 USC §132(a).

Applicant respectfully asserts that one of skilled in the art would, after review of the specification as filed, appreciate that the diaphragm associated with the drain port would be cut to allow subsequent flow therethrough. Thus, no new matter was added in the Amendment submitted August 26, 2005. Nevertheless, in order to facilitate prosecution, Fig. 8 and the specification have been amended to remove the objected-to language.

Accordingly, it is believed that these objections have been sufficiently addressed.

#### **Paragraphs 6 - Drawing Objection**

The Examiner has objected to Fig. 6 as having an incorrect reference number. More specifically, the Examiner stated that reference number "28" should be -- 29 --.

Applicant directs the Examiner's attention to the August 26, 2005 Amendment wherein the requested change was made. A copy of the previously submitted drawing changes are included herewith for the Examiner's review.

As this objection was previously addressed, withdrawal of the same is respectfully requested.

### **Paragraph 7 - Informalities**

The Examiner has objected to various informalities in the Amendment filed August 26, 2005, specifically the amendments to the specification page 7, line 10. The specification has been amended to correct the errors identified by the Examiner.

### **Paragraph 8 - Antecedent basis for “Thin membrane”.**

The Examiner has objected to the specification as failing to provide proper antecedent basis for the term “thin membrane” found in Claim 18. The objected-to term has been cancelled from the claims, thereby obviating this rejection.

### **Paragraph 9 - Claim Rejections 35 USC §112**

The Examiner has rejected Claims 11, 14, 16, 21 and 23 as being indefinite. More specifically, the Examiner has alleged that the use of the phrase “adapted to” in Claim 11 is indefinite because it is unclear whether the bathtub is positively claimed. Applicant traverses as it is believed that the use of “adapted to” in the claims at issue would not be indefinite to one of skill in the art.

The bathtub is not part of the claimed invention. The bathtub is the environment that the claimed subcombination of elements is *adapted to* be interconnected to. The law is clear that components that are “adapted to” be used in conjunction with claimed elements do not limit the claim. In Re Dean 291 F.2d 947 (C.C.P.A. 1961). In Re Dean concerned a patent application that claimed a camera having a shutter mechanism with a pair of electro-responsive devices that were “adapted to be individually coupled to said [shutter actuating] elements”. *Id.* at 949. The court disagreed with the decision of the Patent Office Board of Appeals that construed the words “adapted to be individually coupled to said [shutter-actuating] elements” to mean a combination of the timer with a shutter. The court stated: “[t]o state mere adaptability of these parts of the timer to perform the coupling function does not import into the claim the shutter to which they are coupled.” *Id.* at 951. Accordingly, by stating that the claimed elements are “adapted to” be joined to a bathtub does not import the bathtub into the claim.

Thus, in light of well-settled precedent, it is respectfully submitted that there can be no confusion as to whether the bathtub is part of Claims 11, 14, 16, 21 and 23, and mention of the bathtub to indicate the environment of the present invention is appropriate.

Applicant disagrees that the bathtub is structurally defined in the claim body. That is, as commonly done, positively claimed elements are preceded by the word “said”. Claim 11 has been amended “the instead of “said” preceded “bathtub”. Thus, one of skill in the art will appreciate that it is specifically intended to exclude “bathtub” from the claims.

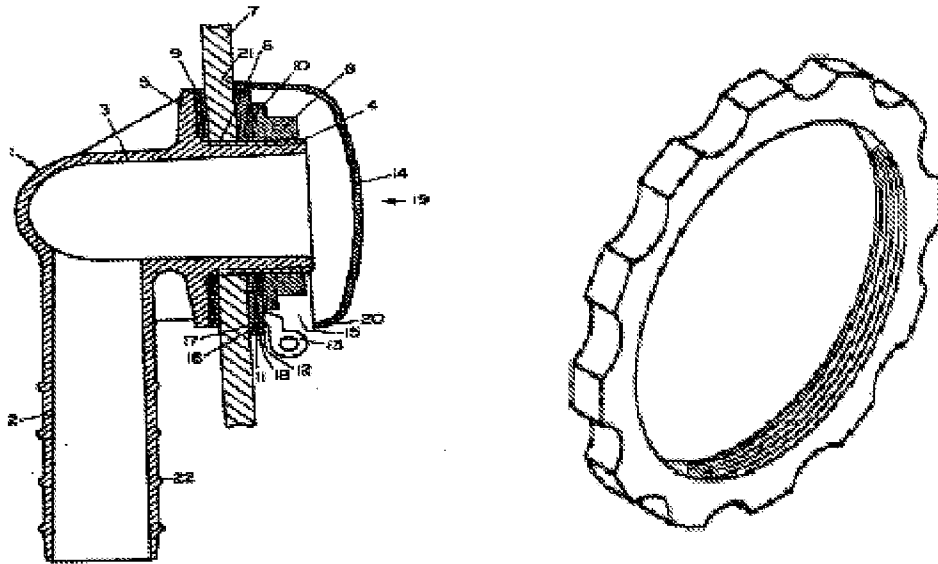
Accordingly, withdrawal of the rejection is respectfully requested.

#### **Paragraph 11 - Claim Rejections 35 USC §103 - Gebert and Fritz**

The Examiner has rejected Claims 11, 12, 14 and 21-23 as being obvious in view of a combination of Gebert (CH 346187) and Fritz. Gebert has been cited for disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. Applicant traverses this rejection as the combination of Gebert and Fritz does not meet the *prima facie* test for obviousness. Alternatively, Applicant requests Fritz be removed as citable prior art since the claimed invention was invented prior to the filing date of Fritz.

#### *Gebert and Fritz*

Obviousness requires a suggestion of all the elements of a claim. *CFMT, Inc. V. Yieldup Int’l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003). Independent Claims 11 and 21 require a nut element, that includes at least one lug for engagement with a cap. Conversely, Gebert discloses an adapter plate 10 positioned on the inner surface of a bathtub that receives a cap and maintains it via conical surface (17), see figures below.



The adaptor plate (10) of Gebert does not possess the required lugs that engage the cap as required by Claims 11 & 21. The cap of Gebert is difficult to correctly mount. More specifically, the adapter plate includes an eyelet (13) that must be positioned downwardly in order to properly receive the chain and stopper as described. Thus, the plate must be precisely screwed onto the overflow port prior to installation in order to ensure the eyelet (13) will be positioned in the correct location after installation. The claimed invention does not burden the installer by requiring this interconnection scheme and in a rod, the nut can be clocked in any way to effectively secure the cap.

### *Fritz*

Withdrawal of the rejection based on a combination of Fritz and Gebert is requested since Applicant can show that the present invention enjoys a date of conception that predates the filing date of Fritz, and that requisite diligence was pursued until constructive reduction to practice (i.e., filing date of the '724 application and applications related thereto).

That is, when any claim of an application is rejected, the inventor of the subject matter of the rejected claim may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claims prior to the effective date of the reference. 37 C.F.R. §1.131. Withdrawal of the rejection is requested in light of the Declarations under 37 C.F.R. §1.131 filed herewith. The Declarations refer to engineering drawings and inventor statements to show conception of embodiments of the present invention and diligence in the filing of the parent application. In light of the enclosed Declarations, Applicant respectfully requests that Fritz be removed as prior art and *all* rejections related to Fritz be withdrawn.

Since Fritz is not prior art, it cannot be combined with Gebert to support this §103 rejection. Thus withdrawal of the rejection to Claims 11, 12, 14 and 21-23 is respectfully requested.

**Paragraph 12 - Claim Rejections 35 USC §103 - Gebert, Fritz and Oropallo**

The Examiner rejected Claims 11, 12, 14 and 21-23 as being obvious in view of a combination of Gebert, Fritz and Oropallo. Generally, Gebert has been cited as disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. Oropallo has been cited for disclosing a cap securing lug. In view of the Declarations under 37 C.F.R. 1.181 filed herewith, Applicant requests that this §103 rejection be withdrawn as Fritz and/or Oropallo are not citable prior art.

*Fritz*

As set forth above, Applicant respectfully requests that all rejections based on Fritz be withdrawn as it is not prior art.

*Oropallo*

Withdrawal of this rejection is respectfully requested in light of Declarations pursuant to 37 C.F.R. §1.131 filed herewith. More specifically, Applicant has reasonably shown that the present invention enjoys an effective filing date prior to that of Oropallo, thereby removing Oropallo as a prior art reference.

When any claim of an application is rejected, the inventor of the subject matter of the rejected claim may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claims prior to the effective date of the reference. 37 C.F.R. §1.131. Withdrawal of this rejection is requested in light of the Declarations under 37 C.F.R. §1.131 filed herewith. The Declarations rely generally upon engineering drawings and inventor statements to show conception of embodiments of the present invention and diligence to filing of the parent application. In light of the enclosed Declarations, Applicant respectfully requests that Oropallo be removed as prior art and *all* rejections related to Oropallo be withdrawn.

Thus, as Fritz and/or Oropallo cannot be cited as prior art, and, as provided above, the combination of Gebert and Fritz without Oropallo does not include all of the claimed elements, withdrawal of the §103 rejection of Claims 11, 12, 14 and 21-23 is respectfully requested.

**Paragraph 13 - Claim Rejections 35 USC §103 - Gebert, Fritz and Ball ‘241**

The Examiner rejected Claims 13 and 15 as being obvious in view of a combination of Fritz and Ball. Generally, Gebert has been cited as disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. Ball has been cited for teaching a cutting instrument. For the reasons outlined above, Applicant asserts that the combination of Gebert, Fritz and Ball ‘241 do not include each of the elements claimed. Alternatively, it is requested that Fritz and/or Oropallo be removed as citable prior art for the reasons outlined above.

Accordingly, Claims 13 and 15 are believed to be allowable and withdrawal of this rejection is respectfully requested.

**Paragraph 14 - Claim Rejections 35 USC §103 - Gebert, Fritz, Ball ‘931 and Ball ‘241**

The Examiner rejected Claims 16-20 as being obvious in view of a combination of Gebert, Fritz, Ball ‘931 and Ball ‘241. Generally, Gebert has been cited as disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. The Ball references have been cited for disclosing a bath tub plumbing system, etc. For the reasons outlined above, Applicant asserts that this combination of references does not include each of the elements claimed. Alternatively, it is requested that Fritz and/or Oropallo be removed as citable prior art.

Accordingly, Claims 16-20 are believed to be allowable and withdrawal of the § 103 rejection is therefore requested.

***Conclusion***

Applicant respectfully traverses the remainder of the Examiner's assertions as to what is disclosed in and/or taught by the cited prior art. That is, the amendments and arguments presented herein are believed to sufficiently address the rejections. Any Examiner assertions not explicitly addressed are not admitted as true. Furthermore, any arguments concerning motivation to combine, etc. not specifically set forth are not waived, and all prior arguments presented during the prosecution of the instant application are incorporated herein by reference in their entirety.

Based upon at least the foregoing, Applicant believes that all pending claims are in condition for allowance and such disposition is respectfully requested. In the event that a telephone conversation would further prosecution and/or expedite allowance, the Examiner is invited to contact the undersigned.

Respectfully submitted,

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